In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-737

FRANZ GLEN AND GEORGE EVANOVICH
Petitioners-Appellees

v.

RICHARD HONGISTO, ET AL.
Respondents-Appellants

JOSEPH P. MAZZOLA
Petitioner-Appellee

v.

RICHARD HONGISTO, ET AL.
Respondents-Appellants

FRANZ GLEN
Petitioner-Appellee

v.

RICHARD HONGISTO, ET AL.
Respondents-Appellants

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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California Law

Petitioners, Richard Hongisto and Clayton Horn, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit, rendered in these proceedings on July 19, 1978.

OPINIONS BELOW

The order of the Court of Appeals denying rehearing is attached hereto as Exhibit A. The opinion of the Court of Appeals affirming the District is attached hereto as Exhibit B. The opinion of the District Court is attached hereto as Exhibit C.

JURISDICTION

The order of the Court of Appeals denying rehearing was entered on July 19, 1978. The petition for certiorari was filed fewer than 90 days from the date aforesaid. The jurisdiction of this Court is involved under 28 U.S.C. section 1254.

QUESTIONS PRESENTED

The federal District Court for the Northern District of California held that injunction applied against a newspaper advertisement advocating an unlawful strike of public employees was not constitutionally valid pursuant to the First Amendment of the United States Constitution. The United States Court of Appeals for the Ninth Circuit affirmed the question thereby raised as:

1. Whether persons violating a state court injunction against inducing or giving notice of a illegal public employee strike can be held in contempt of court.

CONSTITUTIONAL PROVISIONS

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF FACTS

Petitioner Richard Hongisto was at relevant times herein the Sheriff of the County of San Francisco. Petitioner Clayton Horn was at relevant times herein Judge of the Superior Court for the State of California for the City and County of San Francisco. Respondents are local union officers of unions representing certain employees of the City and County of San Francisco. On April 12, 1976, petitioner Clayton Horn of the Superior Court, after hearing evidence of respondents' conduct related to a strike against the City and County of San Francisco issued a preliminary injunction, providing in part as follows:

> "IT IS ORDERED that, during the pendency of this action, said defendants are enjoined and prohibited from
>
> "1. Striking, or calling or inducing or giving notice of a strike, against the plaintiff, City and County of San Francisco; . . ."
>
> "A few days later (on April 15 and 19), the superior court issued orders to show cause in re contempt for violation of the injunction. After six days of hearings, respondents were adjudged in contempt of the Superior Court. The superior court found that a strike had been called by the respondents and others against the City and County of San Francisco on March 31, 1976, and that it had continued through April, 1976. . . . As to the respondents, the court found that each had violated the injunction by authorizing the publication of a newspaper advertisement which stated that the strike could be settled only through negotiations." The full text of said advertisement is set forth in Appendix C, line 2; Opinion of the District Court).

The district court held that the injunction could not be applied to the advertisement inasmuch as the state court failed to find, and the record failed to establish, that the advertisement was likely to produce imminent lawless action

REASONS FOR GRANTING THE WRIT

1. The decision below granted First Amendment protections to advertisement of unlawful activity in conflict with this Court's decision in Pittsburg Press Co. v. Human Relations Commission, et al. (1973) 413 US 376.

It is undisputed that public employee strikes are illegal under California law. Trustees of Cal. State Colleges v. Local 1352 (1970) 13 Cal.App.3d 863, 867 (hr. den.); City of San Diego v. American Federation of State Etc. Employees (1970) 8 Cal.App.3d 308, 310-313 (hr. Den.); Almond v. County of Sacramento (1969) 276 Cal.App.2d 32, 35-36 (hr. den.); Los Angeles Unified School Dist. v. United Teachers (1972) 24 Cal.App.3d 142, 145 (hr. den.); San Francisco v. Evankovich (1977) 69 Cal.App.3d 41 (hr. den.).

Advertisement in support of unlawful conduct is not protected by the First Amendment. Pittsburg Press Co. v. Human Relations Comm. (1973) 413 US 376.

Accordingly, the advertisement urging continuance of the illegal public employee strike was not protected by the First Amendment. The finding of contempt by the Superior Court of the State of California did not violate the respondents' First Amendment rights. Brandenburg v. Ohio (1969) 396 US 444.

CONCLUSIONS

In the foregoing reasons, a writ of certiorari should issue to review the judgment rendered below and by the Court of Appeals for the Ninth Circuit.

Dated: October 11, 1978

Respectfully submitted,

GEORGE AGNOST,
City Attorney

JOHN A. ETCHEVERS,
Deputy City Attorney

EXHIBITS

EXHIBIT A

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANZ GLEN AND GEORGE EVANKOVICH, *Petitioners-Appellees*, v. RICHARD HONGISTO, Sheriff of San Francisco County, et al., *Respondents-Appellants*.	No. 77-1968
JOSEPH P. MAZZOLA, *Petitioner-Appellee*, v. RICHARD HONGISTO, etc., et al., *Respondents-Appellants*.	No. 77-1978
FRANZ GLEN, *Petitioner-Appellee*, v. RICHARD HONGISTO, etc., et al., *Respondents-Appellants*.	No. 77-2260

ORDER

Before: BROWNING and WALLACE, Circuit Judges, and *BELLONI, District Judge

Appellants' petition for rehearing is denied.

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*Honorable Robert C. Belloni, United States District Judge, District of Oregon, sitting by designation.

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Notice of Entry of Judgment

Please take notice that the judgment was filed and entered in the case noted on the attached disposition (opinion, memorandum or order). Also, please take special notice of the date of filing as it represents the date of entry of judgment.

Important Time Periods

There are fourteen (14) days from the date of entry of judgment in which to file a petition for rehearing. The mandate of the court shall issue twenty-one (21) days after the entry of judgment unless the court orders otherwise. If the court enters an order denying the petition, the mandate will issue (7) days thereafter. For further information regarding these processes, please refer to Rules 36, 40 and 41 of the Federal Rules of Appellate Procedure.

EXHIBIT B

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANZ GLEN AND GEORGE EVANKOVICH, *Petitioners-Appellees*, v. RICHARD HONGISTO, Sheriff of San Francisco County, et al., *Respondents-Appellants*.	No. 77-1968
JOSEPH P. MAZZOLA, *Petitioner-Appellee*, v. RICHARD HONGISTO, etc., et al., *Respondents-Appellants*.	No. 77-1978
FRANZ GLEN, *Petitioner-Appellee*, v. RICHARD HONGISTO, etc., et al., *Respondents-Appellants*.	No. 77-2260
	MEMORANDUM

Appeal from the United States District Court for the Northern District of California

Before: BROWNING and WALLACE, Circuit Judges, and *BELLONI, District Judge

Appellants conceded at oral argument that the contempt judgments could not be sustained if the superior court's injunction were found to be invalid. The only

*Honorable Robert C. Belloni, United States District Judge, District of Oregon, sitting by designation.

issue on appeal, therefore, is whether the injunction could be constitutionally applied to the publication of the newspaper advertisement. The district court held that as applied to the advertisement, the injunction violated appellee's first amendment rights under *Brandenburg v. Ohio*, 395 U.S. 444 (1969). We affirm on this ground for the reasons set forth in the district court's opinion. *See Glen v. Hongisto*, 483 F. Supp. 10, 17-18 (N.D. Cal. 1977).

EXHIBIT C

United States District Court

NORTHERN DISTRICT CALIFORNIA

January 20, 1977

FRANZ GLEN, *Petitioner*, v. RICHARD HONGISTO, Sheriff of San Francisco County, and CLAYTON HORN, Judge, Superior Court, City and County of San Francisco, *Respondents.*	No. C-76-1857 WHO
GEORGE EVANKOVICH, *Petitioner*, v. RICHARD HONGISTO, Sheriff of San Francisco County, and CLAYTON HORN, Judge, Superior Court, City and County of San Francisco, *Respondents.*	No. C-76-1860 WHO
JOSEPH P. MAZZOLA, *Petitioner*, v. RICHARD HONGISTO, Sheriff of San Francisco County, and CLAYTON HORN, Judge, Superior Court, City and County of San Francisco, *Respondents.*	No. C-76-1861 WHO

Local union officers, who were held in contempt of court for violating preliminary injunction issued by state court, filed habeas corpus petitions alleging that sentences were imposed in violation of their constitutional rights. The District Court, Orrick, J., held that: (1) even if contempt decree had been based on factors other than publication of an advertisement, contempt

judgment based partly on publication of advertisement could not stand if publication of advertisement was protected activity, and (2) where injunction prohibited local union officers from striking or inducing strike against city, picketing in support of such strike, or hindering, delaying, or interfering with work at city property in support of such strike, where local union officers caused publication of newspaper advertisement which stated that strike could only be settled through negotiations, and where state board failed to find, and evidence failed to establish, that publication was likely to produce imminent lawless action, application of the injunction to local union officers was unconstitutional and contempt judgment based on supposed violation of injunction was impermissible.

Order accordingly.

1. Contempt 28(1)

Contempt judgment based partly on protected activity cannot stand.

2. Injunction 219

Under California law, person affected by an injunction may challege its validity by either of two methods; first, he may comply with the order while seeking judicial relief, or, second, he may disobey order and raise his claims as a defense in a contempt proceeding; if he selects latter alternative, he may be punished only if validity of order is upheld.

3. Injunction 223

For injunction to apply to noncommercial advertisement and thus to justify finding of contempt, court was required to find that speech involved was directed to inciting or producing imminent lawless action and likely to incite or produce such action. U.S.CA.Const. Amend. 1.

4. Constitutional Law 90.1(7)

Where state court issued preliminary injunction prohibiting local union officers from striking or inducing strike against city, picketing in support of any such strike, or hindering, delaying or interfering with work at city property in support of any such strike, where local union officers caused publication of newspaper advertisement which urged public officials to engage in collective bargaining, and where trial court failed to find, and evidence failed to establish, that publication was likely to produce imminent lawless action, application of injunction to local union officers was unconstitutional and contempt judgment based upon publication was impermissible. U.S.C.A.Const. Amend. 1.

Jerome Garchik, Neyhart & Anderson, San Francisco, Cal., for Franz Glen.

Victor Van Bourg, Van Bourg, Allen, Weinburg & Rogers, San Francisco, Cal., Brundage, Beeson & Pappy, Los Angeles, Cal., for George Evankovich.

Brundage, Beeson & Pappy, Los Angeles, Cal., Marvin E. Lewis, Lewis, Rouda & Lewis, San Francisco, Cal., for Joseph P. Mazzola.

Thomas M. O'Connor, City Atty., George Baglin,

Deputy City Atty., San Francisco, Cal., for respondent Richard Hongisto.

ORRICK, District Judge.

OPINON AND ORDER

Petitioners, Frank Glen, George Evankovich, and Joseph P. Mazzola, were held in contempt of court on June 21, 1976, for violating a preliminary injunction issued by Superior Court of the City and County of San Francisco on April 12, 1976; each was sentenced to serve five days in the county jail and to pay a fine of $500. Each petitions this Court to issue writs of *habeas corpus* under 28 U.S.C. § 2241, alleging that the sentences were imposed in violation of their constitutional rights. The judgments and orders of contempt have been stayed[1] pending this Court's determination of the petitions. For the reasons hereinafter stated, this Court finds that a writ of *habeas corpus* should issue as to each individual.

I.

The petitioners are local union officers. Evankovich

1. Among the original petitioners were certain labor organizations. The stay ordered on September 1, 1976, included these groups. On September 8, however, this Court denied the petitions and dissolved the stay as to the organizations, noting that since the Great Writ may be invoked only to challenge the custody of "persons", it will not lie to review an order of contempt against such legal entities. *See In re Coleman*, 12 Cal.3d 568, 572, n.2, 116 Cal.Rptr. 381, 384, n.2 526 P.2d 533, 536 n.2 (1974). Thereafter, the San Francisco Building and Construction Trades Council, the Laborers International Union, Local 261, and the San Francisco Labor Council filed civil rights actions under 42 U.S.C. § 1983. These suits are not under consideration here.

It should further be noted that at a hearing before this Court, the parties stipulated that they were willing to forego the issuance of an order to show cause. Respondents agreed to waive any argument that the Court's failure to issue an order to show cause precluded it from making any factual or legal contentions. The necessity for further evidentiary hearings is thus obviated. Petitioners have exhausted available state procedures for challenging the judgments of contempt.

is business manager of Local 261 of the Laborers International Union of North America; Glen is business manager-financial secretary of the International Brotherhood of Electrical Workers, Local 6; and Mazzola is business manager-financial secretary-treasurer of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 38. On March 31, 1976, the Superior Court issued a temporary restraining order prohibiting certain concerted action by the petitioners and others. On April 12, 1976, the court, after hearing the evidence and arguments of counsel, issued a preliminary injunction as follows:

> "IT IS ORDERED that, during the pendency of this action, said defendants are enjoined and prohibited from
>
> '1. Striking, or calling or inducing or giving notice of a strike, against the plaintiff, City and County of San Francisco;
>
> '2. Picketing said plaintiff's facilities, buildings, and properties in support, promotion or advocacy of a strike against said plaintiff;
>
> '3. Hindering, delaying or interfering with work at the facilities, buildings and properties of said plaintiff, in support, promotion, or advocacy of a strike against said plaintiff.' "

A few days later (on April 15 and 19), the court issued orders to show cause in re contempt for violation of the injunction. After six days of hearings, petitioners were adjudged in contempt of the Superior Court. The court found that a strike had been called by the petitioners and others against the City and

County of San Francisco on March 31, 1976, and that it had continued through April, 1976. (Memorandum Opinion at 3.) In connection with this finding, the court determined that certain labor organizations had willfully and knowingly violated the injunction by engaging in a series of acts constituting illegal concerted activity against the City. (Memorandum Opinion at 4.) As to the petitioners, the court found that each had violated the injunction by authorizing the publication of a newspaper advertisement which stated that the strike could be settled only through negotiations.[2] (Memorandum Opinion at 10-11.) Terming the

2. The full text of the advertisement read as follows:

"NEGOTIATE—NOW!

State law declares it.
City ordinance requires it.
Good sense demands it.
The only way to end this impasse is through hard, determined, around-the-clock, good-faith negotiations.
The Board of Supervisors is charged under state law and city ordinance to set city pay by collective bargaining.
For weeks now, it has ducked that responsibility. It reneged on an understanding reached with its negotiator. It refused to discuss economic issues of any kind. Now it is trying to impose its own solution on us by another kind of political club—ballot propositions.
None of these devices has anything to do with the issues. None of them can settle the strike.
Only negotiations, intensive, good-faith, around-the-clock negotiations.
Federal mediation can get talks started and help keep them going. We're willing—but not under terms that demand our 'unconditional surrender.'
No strings. Just plain collective bargaining.
We're ready—on an hour's notice.

Striking City Employees

Strike headquarters 1623½ Market Street, San Francisco.

Pay cuts

That's what this
strike's all about
The Supervisors demand that we take pay cuts ranging from $2,700 to $5,000 a year and more.
Mayor Moscone gets a raise of $3,030 a year. Other top city brass get raises of $3,000 to $5,000 a year. Living costs continue to rise. Other workers' living standards go up. But we're told—not asked—to take a cut in pay.
To enforce its demand, the Board has totally denied us the good-faith collective bargaining promised us in state law and city ordinance.

advertisement a "hortatory declamation", the court found that its authorization and publication had "abett[ed] and advis[ed] the striking unions and others to ignore the court orders and escalate their efforts".[3]

II.

The petitioners attack the validity of their contempt adjudications on several grounds. First, they claim that the injunction was issued without an adequate factual basis and was unconstitutionally vague and overbroad. Second, petitioners contend that the evi-

Instead, it enacted its unilateral proposal into law—without negotiations. It refused to discuss any economic issues. It has hidden behind its own ordinance cutting off itself—and the mayor—from face-to-face talks.
Now it proposes to put the 'issues' on the ballot. It does not make sense. How can you set pay scales for 303 job classifications by popular vote? How can you meet the city charter's requirement of 'comparable pay for comparable work? How do you fulfil the legal responsibility for collective bargaining by putting it on the ballot?
Intensive, around-the-clock negotiations are the only answer—the only way out.
Why must we wait any longer?
published by the
JOINT NEGOTIATING COMMITTEE
Joseph O'Sullivan
Carpenters, Local 22
George Evankovich
Laborers, Local 261
Franz E. Glen
Electricians, Local 6
Joseph P. Mazzola
Plumbers & Pipefitters, Local 38
Stanley Jensen
Machinists, District Lodge 115
Stanley M. Smith
San Francisco Building & Construction Trades Council.
Our strike is endorsed by the San Francisco Labor Council; AFL-CIO, SF Building & Construction Trades Council; Bay Cities Metal Trades Council; Joint Council of Teamsters, ILWU. . . ."

3. Petitioner Glen, the court found, had furnished further evidence of contempt in certain declarations which he had field with the court, from which were drawn the inference that Glen "advised his union members to flaunt the prohibitory injunction" at a time when he knew such juidicial restraints were in effect. At this point, the court found that Glen was therefore guilty of two acts of contempt (Memorandum Opinion at 9-10). In the judgment, however the court found each petitioner guilty of one act of contempt and sentenced and fined each identically.

dence adduced at the contempt hearings was insufficient to support a finding that they violated the order. Finally, they assert that they cannot be held in contempt for the mere publication of a newspaper advertisement discussing political and economic issues in a public employee labor dispute because the dissemination of such information is protected by the First Amendment.

A.

[1] While the Memorandum Opinion accompanying the contempt order appears to have based the finding of contempt by the petitioners solely on the publication of the advertisement,[4] the court did mention that it had "not set forth in detail *all* of the elements relied upon in its decision". (Memorandum Opinion at 8, *emphasis added.*) Thus, it would be possible to argue that there may have been other bases for the contempt finding. This argument, however, is both inappropriate and irrelevant. The Supreme Court in *Thomas v. Collins*, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430 (1945), indicated that a contempt judgment based partly on protected activity cannot stand. In *Thomas*, a labor organizer was held in contempt (fined and sentenced to three days in jail) for ignoring an *ex parte* restraining order prohibiting him from violating a Texas registration statute and soliciting labor union memberships in violation thereof. In reversing the judgment of contempt, the Court found it irrelevant that *one* of the acts for which Thomas was held in contempt might validly

4. As to petitioner Glen, see note 3, *supra*.

have been punished. Because the judgment was phrased in general terms and imposed a single penalty for the violations, and because Thomas was, therefore, punished at least in part for protected activity, the Court held that the statute was applied unconsitutionally and that the judgment must fail. *Thomas v. Collins*, *supra*, 323 U.S. at 529, 65 S.Ct. 315.[5]

The Superior Court in the present case stated that the judgment was based on publication of the advertisement. Thus, according to the reasoning in *Thomas*, the judgment must be reversed, regardless of other possible bases for a contempt finding, unless it was constitutionally permissible to punish the publication as a violation of the injunction.

In addition, the respondents (the City) have themselves narrowed the issues here. The City did originally raise the argument that petitioners were punished for conduct in addition to publication of the advertisement. Nevertheless, counsel for the City stated at the hearing before this Court on October 5, 1976, after a discussion of *Thomas*, that he was "willing" to "defend just on the advertisement".

5. Since the organizer in *Thomas v. Collins*, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430 (1945), openly disregarded the order, it might be argued that contempt would have been justified as punishment for lack of respect for the judicial process, regardless of the constitutionality of the order. Thus, it could be contended that the decision in *Thomas* that an injunction covering protected activity must fail is inconsistent with the rule commonly followed by the federal courts that one may not test the constitutionality of an injunction by disregarding it. *See* discussion *infra*. As explained *infra*, however, this rule cannot rationally be applied when the question is not whether the injunction is unconstitutional on its face, but rather whether its application to the conduct in question is permissible. Similarly, the holding in *Thomas* should remain viable when the question is one of application.

B.

Accordingly, the only issue here is whether the Superior Court could, consistent with the First Amendment, find petitioners in violation of the injunction and thereby hold them in contempt of court for publication of the newspaper advertisement.

This issue, in turn, raises two distinct First Amendment questions. The first is whether the injunction was constitutionally defective on its face owing to impermissibly vague and overbroad language. The second is whether the injunction could be constitutionally applied to the publication. It is the second question which is central to the disposition of this case.

[2] Had the injunction by its terms prohibited the publication, there would have been no question that the publication of the advertisement evidenced disregard of the order. In such a case, the determination of the petition for *habeas corpus* would depend on whether the injunction was unconstitutional on its face and, if so, whether petitioners could choose to ignore it. The rule in California, articulated in *In re Berry*, 68 Cal.2d 137, 65 Cal.Rptr. 273, 436 P.2d 273 (1968), is that a person affected by an injunction may challenge its validity by either of two methods. First, he may comply with the order while seeking further judicial relief. Second, he may disobey the order and raise his claims as a defense in a contempt proceeding. If he selects the latter alternative, he may be punished only if the validity of the order is upheld. *See In re Berry*, *supra*, 68 Cal.2d at 149, 65 Cal.Rptr. at 281, 436 P.2d at 281.[6]

In contrast, federal courts, at least in some circumstances, have applied a rule (hereinafter referred to as "the federal rule") that:

> "* * * an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings * * * without regard even for the constitutionality of the Act under which the order is issued." *United States v. United Mine Workers*, 330 U.S. 258, 293, 67 S.Ct. 677, 696, 91 L.Ed. 884 (1947).

See Howat v. Kansas, 258 U.S. 181, 189-190, 42 S.Ct. 277, 66 L.Ed. 550 (1922); *Walker v. City of Birmingham*, 388 U.S. 307, 314, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (1967); *cf. Maness v. Meyers*, 419 U.S. 449, 458-459, 95 S.Ct. 584, 42 L.Ed.2d 574 (1975); *but cf. United States v. Ryan*, 402 U.S. 530, 532 n.4, 91 S.Ct. 1580, 29 L.Ed.2d 85 (1971). If this federal rule applied, in the hypothetical situation described above the constitutionality of enjoining the advertisement would be largely irrelevant. If petitioners were shown to have disregarded the order, the finding of contempt would be proper, unless the order were found to be "transparently invalid or had only a frivolous pretense to validity" (*Walker v. City of Birmingham*, *supra*, 388 U.S. at 315, 87 S.Ct. at 1829; *see In re Berry*, *supra*, 68 Cal.2d

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6. The California rule stems from a number of state court decisions holding that "the violation of an order in excess of the jurisdiction of the issuing court cannot produce a valid judgment of contempt." *In re Berry*, 68 Cal.2d 137, 147, 65 Cal.Rptr. 273, 280, 436 P.2d 273, 280 (1968). "Jurisdiction" refers to power conferred by constitutional, statutory, or decisional law. *Id.*

at 150, 65 Cal.Rptr. at 282, 436 P.2d at 282[7] or unless, perhaps, another narrow exception were recognized.[8]

In the present case, however, the injunction did *not* on its face prohibit the publication in question; *nor* did it clearly cover the activity. Therefore, this Court cannot determine that in publishing the advertisement, petitioners were disregarding the injunction in order to test its validity. The crucial question in a case such as the present one is *not* whether petitioners were free to disregard the injunction, but rather whether *application* of the injunction to the publication was permissible.

The California Supreme Court in *Berry* appears to have recognized this distinction when it spoke of "the California rule that an order *void upon its face* cannot support a contempt judgment". *In re Berry, supra*, 68

7. In *re Berry*, Justice Sullivan equated transparent invalidity with facial invalidity, observing that:

"* * * it is notable that the majority in *Walker* indicated that the [state rule in that case like the federal rule] might be constitutionally impermissible in a case wherein the order or ordinance involved was unconstitutional on its face, or was 'transparently invalid or had only a frivolous pretense to validity.' Thus it appears that the *Walker* decision is consistent with the California rule that an order void upon its face cannot support a contempt judgment." *In re Berry*, 68 Cal.2d 137, 150, 65 Cal.Rptr. 273, 282, 436 P.2d 273, 282 (1968).

This attempt at harmonizing the two rules appears unsuccessful. The *Berry* rule allows a person affected by an injunction to challenge it by disobedience regardless of the closenese of the constitutional question. The fact that an injunction is void "on its face" does not mean that it is transparently frivolous, but rather that its unconstitutionality appears in its very terms, not in its application. While in situations involving transparent invalidity both the *Berry* rule and the federal rule would allow disobedience with impunity, only the *Berry* rule would permit disregard of an injunction void on its face, but not frivolous. This conclusion is strengthened by the fact that the Court in *Walker v. Birmingham*, 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed2d 1210 (1967), was unmoved by albeit "substantial" claims of overbreadth and vagueness—presumably arguments concerning facial but *not* transparent defects—determining that petitioners there were not free to bypass judicial review by disobeying the injunction. *Walker v. Birmingham, supra*, 388 U.S. at 319-320, 87 S.Ct. 1824.

8. *See* note 11, *infra*.

Cal.2d at 150, 65 Cal.Rptr. at 282, 436 P.2d at 282 (emphasis added). The suggestion is thus that the California rule-federal rule difference, to whatever extent it exists, concerns facial invalidity alone.

Similarly, the principal decisions relied on as establishing a "federal rule" all concerned orders which clearly covered the activities in question. *See e. g., United States v. United Mine Workers, supra*, 330 U.S. at 266-267, 67 S.Ct. 677; *Howat v. Kansas, supra; Walker v. City of Birmingham*, 388 U.S. at 317, 87 S.Ct. 1824. Indeed, in *Walker*, the Court noted that four of the eight petitioners had held a press conference at which they had distributed statements declaring their intention to disobey the injunction. Likewise, one of the petitioners had stated at a meeting, ' "Injunction or no injunction we are going to march tomorrow' ". *Walker v. City of Birmingham, supra*, 388 U.S. at 310, 87 S. Ct. at 1826.

Moreover, the distinction drawn here is consistent with the rationale underlying the federal rule that the contempt judgment is intended to punish disrespect of or opposition to the judicial process. *See Walker v. City of Birmigham, supra*, 388 U.S. at 320-321, 87 S.Ct. 1824. Dobbs, *Contempt of Court: A Survey*, Cornell L.Rev. 183 (1971).[9] When, as here, the activity punished is not proscribed in terms, and when, as

9. Professor Dobbs points out that even occasional decisions to allow disregard of injunctions are motivated by respect for the process:

"* * * [I]n some cases, not at all well-defined, courts have refused to permit contempt convictions for the violation of improper court orders, presumably in the belief that enforcement of an unlawful order is itself more unlawful than its violation and more apt to lessen respect for the process." Dobbs, *Contempt of Court: A Survey*, 56 Cornell L.Rev. 183, 216 (1971) (citation ommitted).

here, a substantial question exists as to the applicability of the injunction to the conduct involved, it would be unjust to base a contempt judgment on supposed disregard of the injunction.

In short, the federal rule cited above cannot justify a finding of contempt here since the pivotal question is one of the constitutionality of the injunction as applied rather than its facial validity.[10] Accordingly, this Court finds that a determination of the scope of the federal rule is unnecessary to disposition of the present case for the plain reason that even if petitioners were *not* free to disregard the injunction, their activity does not clearly evidence disregard.[11] Therefore, the Court declines to decide whether petitioners could have ignored the injunction with impunity if it were subsequently found impermissibly vague or overbroad.[12]

10. Of course, the question of facial invalidity is not foreclosed in the present situation. Petitioners refer, however, to facial vagueness and overbreadth, not any terms specifically proscribing publication. If this Court applied the rule in *In re Berry*, 68 Cal.2d. 137, 65 Cal.Rptr. 273, 436 P.2d 273 (1968), to the present case, a finding of unconstitutional vagueness or overbreadth would indeed preclude a judgment of contempt, whether or not petitioners subjectively felt that they were violating the injunction by publishing the advertisement. While petitioners urge that this Court adopt the *Berry* rule as the law of the case, such a course would be improper in this federal court proceeding. Nonetheless, the fact that petitioners might reasonably have relied on the *Berry* rule would be significant if they had acted in direct derogation of the injunction. *See* note 11, *infra*.

11. The Superior Court judge who heard the contempt proceeding stated that each petitioner had willfully violated the injunction. From the court's language, it appears that the finding of willfulness was based on the assumption that the publication ignored the injunction. *See* Memorandum Opinion at 10. If, as petitioners urge, the injunction could not constitutionally apply to their conduct, they could not through publication have engaged in willful violation. Again, it must be stressed that this situation is different from that in which one willfully violates a clearly applicable injunction on the ground that it is unconstitutional.

12. It might be noted, however, that even assuming that the rule discussed above has acquired the stature of a federal rule, it is by no means clear that it would apply to the present case. Resolution of the issue would necessitate consideration of questions including: (1) whether the contempt was civil or criminal and, if it was civil, whether the rule applies to such cases (*see United States v. United Mine Workers*, 330 U.S. 258, 295, 67 S.Ct. 677, 91 L.Ed. 884 (1974); Dobbs, *Contempt of Court: A Survey*, 56 Cornell L.Rev. 183, 235 (1971); *cf. United States v. Dickinson*, 465 F.2d 496, 509 (5th Cir. 1972)); (2) whether petitioners mounted a good faith concurrent challenge to the order's constitutionality and, if so, whether the rule should nonetheless apply (*see United States v. United Mine Workers, supra*, at 303, 67 S.Ct. 667; *see also United States v. Dickinson, supra*, at 511 (suggesting disregard for order justified if inadequate remedies for orderly review or if obedience would require irretrievable surrender of constitutional rights); *cf. United States v. Ryan*, 402 U.S. 530, 532 n.4, 91 S.Ct. 1580, 29 L.Ed.2d 85 (1971); *Maness v. Meyers*, 419 U.S. 449, 458-460, 95 S.Ct. 584, 42 L.Ed.2d 574 (1975)); (3) whether the rule should apply when the state rule allows disregard of an unconstitutional injunction and petitioners thus lack notice that they cannot bypass judicial review (*cf. Walker v. City of Birmingham*, 388 U.S. 307, 319-320, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (1967)); and (4) how to reconcile the apparent inconsistency between *Walker* and *Thomas v. Collins*, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430 (1945).
If the rule did not apply, disregard of the injunction would be permissible only upon the further showing that the injunction, was vague and/or overbroad.

C.

The only remaining question then, and the one dispositive of these petitions, is whether the injunction could be constitutionally applied to the publication of the advertisement, the language of which the state court found to constitute a "hortatory declamation" which compelled the "inference" that the petitioners were "abetting and advising the striking unions and others to ignore the court orders and escalate their efforts." (Memorandum Opinion at 10-11).

First Amendment freedoms are deemed "delicate and vulnerable, as well as supremely precious in our society". *NAACP v. Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963); *Walker v. City of Birmingham, supra*, 388 U.S. at 347-348, 87 S.Ct. 1824 (Brennan, J., dissenting). Accordingly, speech may be restricted only in certain narrowly circumscribed instances. The necessity for stringent protec-

tion is enhanced in the present case because there are two separate and substantial First Amendment interests at stake: (the interest of the petitioners in airing their views, and the public's interest in being informed. *See e. g., New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). With reference to the latter the Supreme Court has emphasized that "[t]he public interest in having free and unhindered debate on matters of public importance [is] * * * the core value of the Free Speech Clause of the First Amendment * * *". *Pickering v. Board of Education*, 391 U.S. 563, 573, 88 S.Ct. 1731, 1737, 20 L.Ed.2d 811 (1968); *cf. City of Madison v. Wisconsin Employment Relations Commission*, 429 U.S. 167, 97 S.Ct. 421, 50 L.Ed.2d 376 (1976). In *Pickering*, the Court observed that teachers (the public employees concerned there) were the most likely to have informed opinions about spending funds allotted to schools. 391 U.S. at 572, 88 S.Ct. 1731. Similarly, this opinions of petitioners here must be deemed particularly valuable to the public.

[3] The Supreme Court has articulated the standard for regulating speech. For the injunction here to apply to the advertisement,[13] and thus to justify a finding of contempt, the court was required to find that the speech involved was "directed to inciting or producing imminent lawless action and * * * likely to incite or produce such action". *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S.Ct. 1827, 1829, 23 L.Ed.2d 430 (1969); see *Healy v. James*, 408 U.S. 169, 188, 92 S.Ct. 2338,

13. Any distinctions for First Amendment purposes between advertisements and other speech are inapplicable here because the advertisement at issue was of a noncommerical nature.

33 L.Ed.2d 266 (1972); *Hess v. Indiana*, 414 U.S. 105, 108, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973); *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441, 448-450, 94 S.Ct. 656, 38 L.Ed.2d 635 (1974).[14] In this light, the Court has emphasized the "rigorous constitutional standards that apply when government attempts to regulate expression" (*Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217, 95 S.Ct. 2268, 2277, 45 L.Ed.2d (1975)), as well as the importance of "precision of drafting and clarity of purpose" in the realm of First Amendment rights. 422 U.S. at 217-218, 95 S.Ct. at 2277.

[4] Also relevant to the issue of the unconstitutional *application* of the injunction to petitioners is the Supreme Court's decision in *Bridges v. California*, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941). Bridges had been cited for contempt for the publication of a telegram he had sent to the Secretary of Labor referring to a court decision as "outrageous" and stating that the union did "not intend to allow state courts to override the majority vote of members * * * and * * * the National Labor Relations Board". 314 U.S. at 276, 62 S.Ct. at 200. That case is distinguishable from the present one, most significantly because the Court found there, and the parties did not dispute, that neither the general law of California nor the court

14. The California Supreme Court in *In re Berry*, 68 Cal.2d 137, 65 Cal.Rptr. 273, 436 P.2d 273 (1968), assumed *arguendo*, without finding, that public employee strikes are illegal and assumed again that publication of articles and distribution of literature could be enjoined insofar as they advocated a strike. 68 Cal.2d at 154, 65 Cal.Rptr. at 285, 436 P.2d at 285. Such statements were simply *dicta*, and assumed *dicta* at that. Moreover, to the extent that the court was refering to mere advocacy, the subsequent decision in *Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969), is to the contrary.

decree which Bridges called "outrageous" prohibited a strike. 314 U.S. at 278, 62 S.Ct. 190. Nonetheless, the decision emphasizes the strictness of the standards which must be met before speech or the press can be restricted. Reviewing the "clear and present danger" cases, Justice Black concluded that what ultimately emerged from them was:

> "* * * a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. These cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights." 314 U.S. at 263, 62 S.Ct. at 194.

The more recent *Brandenburg* standard is even more stringent than that in *Bridges*, as it requires not only imminence and likelihood of the evil, but also an element of intent, as the speech must be "directed to" inciting or producing imminent lawless action. Together, the decisions in *Brandenburg* and *Bridges* point to the inadequacy of the court's finding in the contempt proceeding.

The advertisement here in question simply urged the Board of Supervisors to negotiate by engaging in collective bargaining. The finding that it was a "hortatory declamation" * * * abetting and advising" disregard for court orders and escalation of strike effects is questionable at best. However, assuming the finding is supported by the evidence, petitioners' publication may reasonably be seen as mere advocacy of lawlessness. At most, it can be viewed as directed toward pro-

ducing imminent lawless action. In either case, the *Brandenburg* standard is not met as the finding makes no mention of the likelihood that the publication would effect the result supposedly intended, nor does the record indicate such likelihood.

Thus, this Court is constrained to find that regardless of its facial validity *vel non*, the injunction could not constitutionally be applied to the publication in question. The contempt judgment based on petitioners' supposed violation of the injunction must, therefore, be held impermissible.

Petitioners will prepare and file a judgment approved as to form by defendants on or before February 1, 1977.

In the Supreme Court

OF THE

United States

OCTOBER TERM 1978

No. 78-737

RICHARD HONGISTO, etc., et al.,
Petitioners,

VS.

FRANZ GLEN and GEORGE EVANKOVICH,
Respondents.

RICHARD HONGISTO, etc., et al.,
Petitioners,

VS.

JOSEPH P. MAZZOLA,
Respondents.

RICHARD HONGISTO, etc., et al.,
Petitioners,

VS.

FRANZ GLEN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION BY RESPONDENTS GLEN AND EVANKOVICH

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January 31, 1979

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The respondents FRANZ GLEN and GEORGE EVANKOVICH respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the opinion and judgment of the United States Court of Appeals for the Ninth Circuit, rendered in these proceedings on July 19, 1978.[1]

OPINIONS BELOW
JURISDICTION
QUESTIONS PRESENTED
CONSTITUTIONAL PROVISIONS
STATEMENT OF THE CASE

With respect to the foregoing sections of this brief, respondents Glen and Evankovich adopt and incorporate by reference the corresponding sections of co-respondent Mazzola's brief in opposition, filed herein on or about January 16, 1979.

REASONS FOR DENYING THE WRIT

The Decision Below Is In Harmony With The Applicable Decisions Of This Court, Including Its Decision In PITTSBURGH PRESS CO. v. HUMAN RELATIONS COMMISSION, *413 U.S. 376 (1973).*

To the extent that this Court's decision in *Pittsburg Press Co. v. Human Relations Commission,* 413 U.S. 376 (1973), limits speech from the protection of the First Amendment, its scope is narrowly circumscribed. Nonetheless, the decision is neither in conflict with the decision

[1]The reason for the late filing of this brief is set forth in Exhibit A appended hereto.

below nor with this Court's decision in *Brandenburg v. Ohio,* 395 U.S. 444 (1969).

At its broadest, the *Pittsburg Press Co.* decision holds that a purely commercial advertisement that solicits an illegal transaction is not protected by the First Amendment. Within this holding, the decision operates, in effect, as a shorthand application of the constitutional standard set forth in *Brandenburg v. Ohio, supra,* 395 U.S. at 447. That is, it acknowledges that commercial advertising which solicits an illegal transaction inherently violates the *Brandenburg* standard, i.e., the commercial advertising is directed to produce imminent lawless action and is likely to result in such action.

The two examples of illegal transactions considered in the *Pittsburg Press Co.* decision, the sale of narcotics and the solicitation of prostitution, fit squarely within the *Brandenburg* standard. In *Pittsburg Press,* the Court observed that a commercial advertisement soliciting either crime would not be constitutionally protected speech. *Pittsburg Press Co., supra,* 413 U.S. at 388. Likewise, under the *Brandenburg* standard, it may be deemed inherent that such commercial advertisements are both directed to produce imminent lawless action and likely to result in such imminent lawless action, i.e., narcotic sales or acts of prostitution. These two examples aptly reflect the limited scope of the *Pittsburg Press* holding and its compatability with other decisions of this Court.

The *Pittsburg Press* approach, however, does not affect the within case for two basic reasons: first, the within advertisement was not a commercial solicitation; and second, the advertisement did not solicit an illegal transaction.

The District Court opinion below specifically found that the advertisement was noncommercial:

> "Any distinctions for First Amendment purposes between advertisements and other speech are inapplicable here *because the advertisement at issue was of a noncommercial nature.*" *Glen v. Hongisto,* 438 F.Supp. 10, 17 n. 13 (emphasis added)[2]

The correctness of the finding cannot be doubted as it is apparent that the advertisement was purely informational, directed to the public and the Board of Supervisors setting forth a grievance and presenting a political and socio-economic opinion.

It is just as apparent that the advertisement did not solicit an illegal transaction. Nowhere in the advertisement did it request that the San Francisco employees go out on strike; nowhere did it request that employees violate the law. To the contrary, the advertisement served two separate and substantial First Amendment interests as observed by the District Court:

> "The necessity for stringent protection is enhanced in the present case because there are two separate and substantial First Amendment interests at stake: the interest of the petitioners in airing their views, and the public's interest in being informed. *See, e.g., New York Times v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686 (1964). With reference to the latter, the Supreme Court has emphasized that '[t]he public interest in having free and unhindered debate on matters of public importance [is] . . . the core value of the Free Speech Clause of the First Amendment

[2]The opinion is reproduced as Exhibit C to the Petition for a Writ of Certiorari.

> . . .' *Pickering v. Board of Education,* 391 U.S. 563, 573, 88 S.Ct. 1731, 1937, 20 L.Ed.2d 811 (1968); cf. *City of Madison v. Wisconsin Employment Relations Commission,* 429 U.S. 167, 97 S.Ct. 421, 50 L.Ed. 376 (1976). In *Pickering,* the Court observed that teachers (the public employees concerned there) were the most likely to have informed opinions about spending funds allotted to schools. 391 U.S. at 572, 88 S.Ct. 1731. Similarly, the opinions of petitioners here must be deemed particularly valuable to the public." *Glen v. Hongisto, supra,* 438 F.Supp. at 17.

The type of advertisement for which respondents were held in contempt by the California trial court was, in fact, expressly protected by this Court in its *Pittsburg Press Co.* decision:

> "We emphasize that nothing in our holding allows goverment at any level to forbid Pittsburg Press to publish and disseminate advertisements commenting on the Ordinance [forbidding discriminatory business practices], the enforcement powers of the Commission, or the propriety of sex preference in employment." *Pittsburg Press Co., supra,* 413 U.S. at 391.

Thus, while the *Pittsburg Press Co.* decision may not enjoy the unanimity of the Court, the decision below is not in conflict with it, nor does the within case offer a legitimate basis for re-examining the Court's prior decisions.

CONCLUSION

Based upon the foregoing, the Petition for a Writ of Certiorari should be denied.

Dated: January 31, 1979.

Respectfully submitted,

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(Exhibit follows)

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January 17, 1979

Michael Rodak, Jr.
Clerk
Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543

Re: Richard Hongisto, etc., et al.
v. Franz Glen, et al., No. 78-737

Dear Mr. Rodak:

This office has just been informed of your letter of December 18, 1978 addressed to Albert Brundage informing his office that the Court requested a response to the certiorari brief filed by the City and County of San Francisco in the above captioned case. You will note that we were not copied on your letter. This office represents Respondents Glen and Evankovich. It had been our intention to waive the filing of an opposition brief. However if the court desires a response from us please so inform me of same and of the date upon which our brief should be filed.

Yours very truly,

JOHN L. ANDERSON

JLA:mlc

In the Supreme Court of the United States

OCTOBER TERM 1978

No. 78-737

RICHARD HONGISTO, ETC., ET AL.	*Petitioner*
v.	
FRANZ GLEN and GEORGE EVANKOVICH	*Respondent*
RICHARD HONGISTO, ETC., ET AL.	*Petitioner*
v.	
JOSEPH P. MAZZOLA	*Respondent*
RICHARD HONGISTO, ETC., ET AL.	*Petitioner*
v.	
FRANZ GLEN	*Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

Respondent's Brief in Opposition

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January 9, 1979

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RICHARD HONGISTO, ETC., ET AL.	*Petitioner*
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FRANZ GLEN	*Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

Respondent's Brief in Opposition

The respondent, Joseph P. Mazzola, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion and judgment of the United States Court of Appeals for the Ninth Circuit, rendered in these proceedings on July 19, 1978.

OPINIONS BELOW

The order of the Court of Appeals denying rehearing is attached to the petition for a writ of certiorari as

Exhibit A. The opinion of the Court of Appeals affirming the District Court is attached to the petition for a writ of certiorari as Exhibit B. The opinion of the District Court is attached to the petition for a writ of certiorari as Exhibit C.

JURISDICTION

The order of the Court of Appeals denying rehearing was entered on July 19, 1978. The petition for certiorari was filed fewer than 90 days from the date aforesaid. The jurisdiction of this Court is involved under 28 U.S.C. section 1254.

QUESTIONS PRESENTED

The Circuit Court of Appeals for the Ninth Circuit affirmed the holding of the District Court that an injunction of a California State Superior Court, applied against a newspaper advertisement placed by respondent concerning a strike of public employees, was not constitutionally valid pursuant to the First Amendment of the United States Constitution.

The single question presented is:

1. Was the Circuit Court of Appeals clearly erroneous in its determination that the newspaper advertisement was constitutionally-protected speech?

CONSTITUTIONAL PROVISIONS

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." First Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner Richard Hongisto was at relevant times herein the Sheriff of the County of San Francisco. Petitioner Clayton Horn was at relevant times herein Judge of the Superior Court for the State of California for the City and County of San Francisco. Respondents are local union officers of unions representing certain employees of the City and County of San Francisco. On April 12, 1976, petitioner Clayton Horn of the Superior Court, after hearing evidence of respondents' conduct related to a strike against the City and County of San Francisco, issued a preliminary injunction providing in part as follows:

> "IT IS ORDERED that, during the pendency of this action, said defendants are enjoined and prohibited from:
>
> "1. Striking, or calling or inducing or giving notice of a strike, against the plaintiff, City and County of San Francisco; . . ."

A few days later, on April 15th and 19th, the superior court issued orders to show cause in re contempt for violation of the injunction. After six days of hearings, respondents were adjudged in contempt of the superior court. The superior court found that a strike had been called by the respondents and others against the City and County of San Francisco on March 31, 1976, and that it had continued through April, 1976. As to the respondents, the court found that each had

violated the injunction by authorizing the publication of a newspaper advertisement which stated that the strike could be settled only through negotiations. The full text of said advertisement is set forth in the opinion of the District Court, 438 F. Supp. 10, at 12 note 2, (Exhibit C to the petition for writ of certiorari, and Exhibit A herein).

At oral argument before the District Court, petitioner conceded that the contempt judgments of the state superior court could not be sustained if the superior court's injunction was found to be invalid.

The District Court held that as applied to the advertisement, the injunction violated respondent's first amendment rights under *Brandenburg v. Ohio*, 395 U.S. 444 (1969). The Court of Appeals for the Ninth Circuit affirmed on this ground and for the reasons set forth in the District Court's opinion.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The decision below, which granted first amendment protections to the publication of an advertisement by labor leaders concerning a labor dispute, is not in conflict with this Court's decision in *Pittsburgh Press Co. v. Human Relations Commission, et al.*, 413 U.S. 376 (1973).

Petitioner's application for the writ of certiorari asserts that public employee strikes are illegal under California law and that an advertisement in support of unlawful conduct is not protected by the First Amendment. As authority for the latter proposition of law petitioner cites this Court's holding in *Pittsburg Press v. Human Relations Commission et al.*, 413 U.S. 376 (1973). Petitioner concludes that the advertisement

in this case, which concerned a public employees strike, was not protected by the First Amendment.

Application of *Pittsburg Press*, *id.*, to the non-commercial advertisement in the present case so as to strip respondents' advertisement of first amendment protections would render completely inoperative the holding of this Court in *Pittsburg Press*, *id.*, that first amendment protections *do* attach to the very type of advertisement published by respondents in this case.

In holding that the advertisement before the Court in *Pittsburgh Press* was not protected by the First Amendment, and therefore subject to a local ordinance's prohibition against sex discrimination, the Court explicitly distinguished the Commercial ad before it from an advertisement which ". . . 'communicated information, expressed opinion, recited grievances, protected claimed abuses . . .' " *Pittsburg Press id.*, at 385, quoting from *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964).

Pittsburg Press was explicitly limited to ads which "did no more than propose a commercial transaction," *id.*, at 385, and was never meant to apply to non-commercial ads such as in the instant case. The Court in *Pittsburg Press* made it clear that a non-commercial ad was entitled to full constitutional protection.

The decision of the Ninth Circuit below,[1] affirming the District Court's holding that the injunction in the present case, as applied to the advertisement, violated respondents' first amendment rights under *Branden-*

1 Reproduced as Exhibit B in the Petition for a writ of certiorari.

burg v. Ohio, 395 U.S. 444 (1969), was based on the grounds and reasons set forth in the opinion of the District Court.[2]

The District Court's application of the *Brandenburg* standards to the ad purchased by respondents was premised on the finding that "the advertisement at issue was of a non-commercial nature" *Glen v. Hongisto*, 438 F. Supp. 10 at 15, n.7 (N.D. CA 1977). The District Court criticized the California State Superior Court's characterization of the ad in the contempt proceedings:

"The advertisement here in question simply urged the Board of Supervisors to negotiate by engaging in collective bargaining. The finding that it was a 'horatory declamation . . . abetting and advising disregard for court orders and escalation of strike effects,' is questionable at best." *Glen v. Hongisto, supra*, at 18.

Petitioner's reliance on *Pittsburg Press* for the stated proposition that advertisements in support of unlawful conduct are not protected by the First Amendment is erroneous because the Court in *Pittsburg Press* drew a careful distinction between commercial advertisements lacking first amendment protections, and non-commercial ads, as the ad in question, which are accorded first amendment status. The District Court's finding, adopted by the Ninth Circuit, that the ad in question was directed at influencing the Board of Supervisors on an issue of public importance, and not commercial speech, places the decision below in full

2 Reproduced as Exhibit C in the Petition for a writ of certiorari.

accord with the decision in *Pittsburg Press*. Moreover, the district court's finding with respect to the nature of the ad in question, which received the concurrence of the Ninth Circuit, clearly is not a "very obvious and exceptional error." *Graver Mfg. Co. v. Linde Co.* 336 U.S. 271, 275 (1949).

This Court has established that speech is not rendered commercial by the mere fact that it relates to an advertisement. *New York Times v. Sullivan, supra*, at 266; *Bigelow v. Virginia*, 421 U.S. 809, 820-21 (1975). The contents of an advertisement, then, not the fact that it was paid for, are determinative of its commercial character.

The full text of the advertisement placed by respondent in a local newspaper is reproduced as a footnote to the opinion of the District Court. *Glen v. Hongisto, supra* at 12, note 2.[3] It is clear from the text of the ad that respondents endeavored to address a message to the Board of Supervisors of the City and County of San Francisco and the general public concerning the issues underlying the labor dispute and the need for collective bargaining to resolve an impasse between the two sides.

The contents of the ad are obviously communicative in nature, "pure speech," and well within the first amendment guarantees of free speech and the right to open and far-reaching discussion and publicity of the issues involved in a labor dispute. *Senn v. Tile Layers Protective Union*, 301 U.S. 468, 478 (1936); *Thornhill*

3 The text of the Ad, as reproduced in the opinion of the District Court, is set forth as Exhibit A of the Appendix to this brief in opposition.

v. Alabama, 310 U.S. 88 (1940); *Bridges v. California*, 314 U.S. 251 (1941); *Cafeteria Employers v. Angelos*, 320 U.S. 293, 295 (1943); *Thomas v. Collins*, 323 U.S. 516 (1944); *U.F.W. v. Superior Court*, 4 Cal. 3d. 902, 910-912 (1975).

2. This Court's holding in *Pittsburg Press* does not preclude the attachment of first amendment protections to respondents' advertisement in light of recent decisions of this Court.

Even if it is assumed, *arguendo*, that the advertisement placed by respondent in a local newspaper fell within the class of commercial advertisements recognized in *Pittsburg Press*, to which first amendment protections do not apply, recent decisions of this Court have explicitly rejected the "commercial speech" exception to the First Amendment and have extended first amendment protections to even purely commercial advertising. *Biglow v. Virginia*, 421 U.S. 809 (1975), *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977); *Carey v. Population Services International*, 431 U.S. 678, (1977); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); reh. den. (U.S.) 434 U.S. 881.

In *Carey v. Population Services International, supra*, at 701, this Court explicitly applied the *Brandenburg* test to commercial advertisements. In striking down a prohibition of advertisements of the sale of contraceptives, the Court held that "none of the advertisements in question can even remotely be characterized as 'directed to inciting or producing imminent or lawless

action and likely to incite or produce such action.' *Brandenburg v. Ohio . . .*" *Carey, id.*

3. The decision below correctly applied the Constitutional standard of *Brandenburg v. Ohio*, 395 U.S. 444 (1969), to the content of respondent's advertisement.

Notwithstanding its reservations about the State Court's characterization of the ad, the District Court assumed that the finding of the Superior Court of the State of California was supported by the evidence. The Court went on to conclude:

> "(respondent's) publication may reasonably be seen as mere advocacy of lawlessness. At most, it can be viewed as directed toward producing imminent lawless action. In either case, the *Brandenburg* standard is not met as the finding makes no mention of the likelihood that the publication would effect the result supposedly intended, nor does the record indicate such likelihood." *Glen v. Hongisto, supra*, at 18.

The District Court, with the concurrence of the Ninth Circuit, properly applied the two *Brandenburg* requirements that advocacy of use of force or law violation be "directed to inciting or producing imminent lawless action and is likely to incite or produce such action," in order to lose its protected character. *Brandenburg, supra*, at 447. Even a cursory reading of respondents' publication demonstrates that the court was not "clearly erroneous" in its application of the *Brandenburg* standards to the contents of respondents' advertisement. *Graver Mfg. Co. v. Linde Co., supra.*

An important part of the instant advertisement is purely informational, reporting that the Mayor, and

"other top city brass," were being given substantial raises while protesting craft workers were subjected to pay cuts of equal amounts.

The advertisement's protests of the Board of Supervisors' then stated intention to submit the details of craft pay cuts to direct voter action was directed against pending legislation, and was protected speech for that reason regardless of the charged public labor context in which it arose. *Street v. New York*, 394 U.S. 576, 591 (1969).

Finally, the advertisement seeks to marshall public opinion in favor of the proposition that the Board of Supervisors should negotiate with the labor representatives over the various wage issues underlying the present dispute. The banner of the advertisement states:

"Negotiate — Now!"

Clearly, the advertisement was directed at public opinion and the Board of Supervisors with the intent of producing "intensive, around-the-clock-negotiations"—as noted in the advertisement's concluding language, not "imminent lawless action" within the meaning of *Brandenburg*. While it may be reasonably doubted that the ad would be successful in its intended effect, to induce negotiations, there is no basis whatsoever to conclude that the two courts below were in "obvious and exceptional error," *Graver Mfg. Co. v. Linde Co.*, *supra*, in finding that there was no likelihood that the advertisement would effect the supposedly intended unlawful action. *Glen v. Hongisto*, *supra*, at 18.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Dated: January 9, 1979

Respectfully submitted,

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EXHIBIT A

The full text of the instant advertisement, as it appeared in the opinion of the District Court, *Glen v. Hongisto*, 438 F. Supp. 10, at 12, note 2, (N.D. CA 1977) read as follows:

"NEGOTIATE - NOW

"State law declares it.

"City ordinance requires it.

"Good sense demands it.

"The only way to end this impasse is through hard, determined, around-the-clock, good-faith negotiations.

"The Board of Supervisors is charged under state law and city ordinance to set city pay by collective bargaining.

"For weeks now, it has ducked that responsibility. It reneged on an understanding reached with its negotiator. It refused to discuss economic issues of any kind. Now it is trying to impose its own solution on us by another kind of political club—ballot propositions.

"None of these devices has anything to do with the issues. None of them can settle the strike.

"Only negotiations. Intensive, good faith, around-the-clock negotiations.

"Federal mediation can get talks started and help keep them going. We're willing—but not under terms that demand our "unconditional surrender."

"No strings. Just plain collective bargaining.

"We're ready—on an hour's notice.

"Striking City Employees

"Strike headquarters 1623½ Market Street, San Francisco

"Pay cuts

"That's what this
"strike's all about

"The Supervisors demand that we take pay cuts ranging from $2,700 to $5,000 a year and more.

"Mayor Moscone gets a raise of $3,030 a year. Other top city brass get raises of $3,000 to $5,000 a year. Living costs continue to rise. Other workers' living standards go up. But we're told—not asked—to take a cut in pay.

"To enforce its demand, the Board has totally denied us the good-faith collective bargaining promised us in state law and city ordinance.

"Instead, it enacted its unilateral proposal into law —without negotiations. It refused to discuss any economic issues. It has hidden behind its own ordinance cutting off itself—and the mayor—from face-to-face talks.

"Now it proposes to put the 'issues' on the ballot. It does not make sense. How can you set pay scales for 303 job classifications by popular vote? How can you meet the city charter's requirement of "comparable pay for comparable work?" How do you fulfill the legal responsibility for collective bargaining by putting it on the ballot?

"Intensive, around-the-clock negotiations are the only answer—the only way out.

"Why must we wait any longer?

"published by the

"JOINT NEGOTIATING COMMITTEE

"Joseph O'Sullivan
"Carpenters, Local 22
"George Evankovich
"Laborers, Local 261
"Franz E. Glen
"Electricians, Local 6
"Joseph P. Mazzola
"Plumbers & Pipefitters, Local 38
"Stanley Jensen
"Machinists, District Lodge 115
"Stanley M. Smith
"San Francisco Building &
"Construction Trades Council.

"Our strike is endorsed by the San Francisco Labor Council; AFL-CIO, SF Building & Construction Trades Council; Bay Cities Metal Trades; Joint Council of Teamsters, ILWU . . ."